

**Editor's note: Appealed -- rev'd, Civ. No. A76-28 (D. Alaska Oct. 2, 1978), aff'd, No. 78-3700, 78-3703 (9th Cir. Feb. 2, 1981) 638 F.2d 122**

LLOYD SCHADE

IBLA 70-131

Decided August 8, 1973

Appeal from a decision by the Office of Appeals and Hearings, Bureau of Land Management, rejecting in part an application to purchase a trade and manufacturing site (Anchorage 050136).

Affirmed.

Alaska: Trade and Manufacturing Sites

Open land sought by a trade and manufacturing site applicant as a watershed to insure the continuing pure water supply for his slaughterhouse operation may not be patented under the trade and manufacturing site law because such land contains no improvements, is not actively occupied, and is not actively used by the applicant in the furtherance of his business.

APPEARANCES: Lloyd Schade, pro se; James R. Mothershead, Esq., Office of the Regional Solicitor, Department of the Interior, Anchorage, Alaska, for the Government.

#### OPINION BY MR. GOSS

Lloyd Schade has appealed from a decision dated February 20, 1970, of the Office of Appeals and Hearings, Bureau of Land Management (BLM), which disallowed 22 1/2 acres of a trade and manufacturing site. The 22 1/2 acre parcel is adjacent, open, unfenced land which constitutes watershed for a spring used as a water supply in the operation of a slaughterhouse on the site.

Appellant originally applied to purchase 80 acres of public land in Alaska as a trade and manufacturing site pursuant to the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970). In 1966 the Anchorage Land Office approved the application as to 60 acres. Schade appealed and the Office of Appeals and Hearings, BLM, held that no more than 10 acres were necessary for the slaughterhouse business. On appeal the BLM decision was set aside and a hearing ordered.

Following the hearing, Administrative Law Judge John R. Rampton, Jr., 1/ ruled on September 3, 1969, that Schade should receive patent to 52 1/2 acres. The Government appealed that part of the Judge's decision which allowed Schade 22 1/2 acres as watershed to protect the spring below from possible future contamination. In 1970 the Office of Appeals and Hearings, BLM, issued its decision 2/ disallowing the 22 1/2 acres, thereby leaving Schade with 30 acres of the original 80 sought.

In the present appeal appellant asserts that he cannot operate without the watershed area. Even though he states that he could possibly have gotten along with 52 1/2 acres by modifying his operation, appellant now argues that 70 acres are necessary for a successful operation. Appellant has a 160-acre homestead on lands contiguous to the land on which he operates a slaughterhouse. He contends that without the slaughterhouse there would be no market for the hay and grains produced on his and other nearby land because such hay and grains are sold to the neighboring ranchers for feeding livestock, which in turn are processed in the slaughterhouse.

Section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970), provides that:

Any citizen of the United States \* \* \* in the possession of and occupying  
public lands in Alaska in

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1/ The title of the hearing officer has been changed from "Hearing Examiner" to "Administrative Law Judge." 38 FR 10939.

2/ It was the intention of the Office of Appeals and Hearings decision that the land to be patented include appellant's spring and spring house. The Administrative Law Judge found that the enclosed spring was within the E 1/2 SE 1/4 NW 1/4 NW 1/4, SW 1/4 NE 1/4 NW 1/4 sec. 8, T. 5 S., R. 11 W., Seward Meridian. A typographical error appears in the decision of the Office of Appeals and Hearings at 2, line 4, in that the E 1/2 SE 1/4 NW 1/4 NW 1/4 was clearly intended; there is no error in the order contained in the decision. A sketch included with appellant's statement of reasons indicates the spring is located outside the area to be granted. The sketch thus conflicts with appellants exhibit E submitted at the hearing. No request for rehearing or offer of proof was submitted and there was no persuasive discussion of any such problem in the statement of reasons. However, if a discrepancy as to the location of the spring is indicated by official on ground survey, the spring improvements, as they existed as of the date of final proof, should be included in the patent.

good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at \$2.50 per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry \* \* \*. (Emphasis added.)

The regulations, 43 CFR 2562.3(d)(1), also require that the application to purchase must show "[t]hat the land is actually used and occupied for the purpose of trade, manufacture or other productive industry \* \* \*." (Emphasis added.)

It is admitted that appellant has erected substantial improvements on part of the land described in his application for a trade and manufacturing site; all of such land, encompassing 20 acres, has been approved for patenting to appellant. The watershed area at issue is unimproved land. We recognize that each portion of a trade and manufacturing site need not contain physical improvements. Ten acres of unimproved lands were approved for patent to appellant as a disposal area for offal. However, it is acknowledged that waste disposal is an integral part of a slaughterhouse operation and the granting of a disposal area anticipates the continued active use by appellant of such lands for the burial of waste materials.

The right to purchase lands under the trade and manufacturing law is limited to those lands which are actually occupied and used for trade and manufacturing. Golden Valley Electric Association, 8 IBLA 368 (1972); Wilbur J. Erskine, 51 L.D. 194 (1925). The watershed land is not sought by appellant so that it may be actively used for his operation, as is the land granted for disposal purposes, but rather appellant seeks a non-active use of the watershed. Appellant seeks to patent the watershed area in order to insure that his water supply never becomes contaminated through the use of the land by another. We do not feel that such insurance was contemplated in the trade and manufacturing site law. The use contemplated in the statute is an active use of the land. As was stated in the decision below:

\* \* \* We must consider, then, whether the eventual use of the water which has percolated under the land constitutes use, occupancy and possession of the land itself.

\* \* \* \* \*

[W]e can hardly \* \* \* hold that the eventual use of water passing underground en route to the spring is a use of land through which it passes.

The Department has held that a mere clearing for the construction of buildings is not occupancy. Kenneth Brown Laughlin, A-25648 (August 5, 1949). \* \* \* [T]he scope of the Act is not so broad as to authorize a citizen to lay claim to public land for the purpose of charging a fee for the privilege of hunting wild game thereon, notwithstanding that such lands may have been improved by the construction of shooting boxes or blinds. Carl A. Bracale, Jr., Anchorage 050382 (March 11, 1969).

\* \* \* \* \*

Even if the watershed were allowed, there is nothing to warrant that the land beyond would not be used in some manner which would be detrimental to the water supply. Such risks must be borne by the individual engaged in the business enterprise.

The trade and manufacturing site law does not make large peripheral areas available to insulate or isolate a private business geographically, or to insure the claimant against possible incompatible uses which might cause difficulties or additional expense in the future.

None of appellant's other contentions offset the reasoning advanced in the decision below or set forth a legal basis for reversing that decision. While we appreciate appellant's concern with maintaining the quality of his water supply in order to protect his slaughterhouse, we do not feel that the trade and manufacturing site law may be interpreted so as to allow the patenting of the 22 1/2 acres herein concerned.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss, Member

We concur:

Douglas E. Henriques, Member

Joan B. Thompson, Member

Martin Ritvo, Member

Messrs. Frishberg and Stuebing did not participate in this decision.

MRS. LEWIS DISSENTING.

I disagree with the majority and agree with the Administrative Law Judge, who in the present case ruled that appellant might properly have a total of 52 1/2 acres for a requested trade and manufacturing site.

The only issue is the inclusion of a certain 22 1/2 acres in the requested site. Appellant originally sought 80 acres. At almost every level of the Department when his application was considered, the Department reduced his requested acreage, respectively, from 80 to 60, from 60 to 10, increased to 52 1/2, and then reduced from 52 1/2 to 30.

The majority sets forth the statute providing for the sale of land not exceeding 80 acres to a citizen of the United States in the possession of and occupying public lands in Alaska in good faith for the pursuit of trade, manufacturing, or other productive industry, upon submission of proof that the said area embraces improvements of the claimant and is needed in the prosecution of such trade or manufacturing.

The appellant has operated a bona fide slaughterhouse since March 6, 1964. He has placed on the land a slaughterhouse building, 16 x 24 feet, costing \$15,000; two holding pens of nominal cost; a water supply (spring type with reservoir) costing \$1,200; and a retaining pasture costing \$1,200. He also has several portions of a road on the requested site. The 80 acres he originally sought are contiguous on the north to his patented 160-acre homestead. With respect to the 52 1/2 acres granted by the Administrative Law Judge, the slaughterhouse building is located 150 feet from the spring. The spring is in a 2 1/2 acre area that is on the edge of the 30 acres granted by the majority. The 22 1/2 acres denied by the majority lie north and west of, and adjoining, the 2 1/2 acre area including the spring. The slope of the ground is a steady drop, approximately one foot to every ten feet from the northwest corner of the entire site sought to the spring. Based on the decision of the present majority, there is no protection of the watershed to the spring beyond approximately one acre.

In the slaughterhouse operation, water is used to wash the carcasses. The person doing the cutting continually washes down the carcass and his hands so that the hair, manure, and dirt are removed as the butchering proceeds. The knife must be continually cleaned during the process.

Slaughterhouse operations are strictly regulated by governmental authorities. The slaughterhouse operation herein involved cannot exist without a source of pure water, the source of which is the spring. When the state and federal health authorities approved the spring as a source of water, it was on the grounds that there was nothing in the slope above the spring, such as a dwelling or a herd of cattle, which could contaminate it.

In his statement of reasons in support of this present appeal, appellant states:

1. May 26, 1967 decision should have been only regarding the 20 acres appealed from thereby allowing me the 70 acres.
2. I decided not to appeal Mr. Rampton's September 3, 1969 decision as I could have lived with the 52-1/2 acres by moving the access road, cutting down the size of my holding pen and being as nasty as hell to anyone building in the 7-1/2 acre canyon. However, I do need it if I don't go through additional expense and I am using and occupying this additional acreage in 1964.
3. We cannot operate without this watershed area. I have said it through the last six years as shown in the hearing and verified by the documents dated June 13, 1968 from the Director of Agriculture, Alaska. In the February 20, 1970 decision Mr. Frishberg regarded my watershed area used to protect the spring below from possible future contamination or loss of clean water needed in the conduct of the slaughterhouse operations. (page 1, paragraph 3) It has been used for potable water from the very beginning, past, present, and will be used for the future, Page 3 paragraphs a & d Federal Review Report.

Note the arrows on Chart 1 showing the drainage of that area. I chose this location because of the terrain and the land on this watershed area drains away from my spring. The area number 5 [the watershed area] has been cleared of stagnated water holes allowing good drainage of surface water from the spring area so that no surface stagnation will be possible. The house locations on all other adjacent property will never allow

the water to become contaminated. If I lose the watershed area my operation will be unstable and will not warrant the upkeep required by Federal Regulations.

4. Chart 4 denotes the acreage which BLM felt was used and occupied. Please note Mr. Edwards statement "that our survey was not accurate". Mr. Edwards was one of the original field examiners and the erroneous decisions have been made from this inaccurate sketch.

With this appeal I wish to stress my need for the 70 acres for a successful operation. This decision not only determines whether I continue to farm and other people continue to ranch or we abandon agriculture and go into other business fields. Let's face it, without this slaughterhouse which is under State and Federal Regulations we have no means to market our natural resources such as hay and grain produced on the land. This hay and grain is sold to the ranchers and farmers for their livestock which in turn are processed in the slaughterhouse and sold to the public with the assurance that they are getting a good, clean, wholesome, inspected product.

There are no precedents involving the factual situation before us. Nor is there any legislative history on the trade and manufacturing statute to guide us. It would seem indisputable from the face of the statutory language that the law was passed to encourage the development of business in Alaska. There has been no statutory modification or limitation on this purpose since the act was passed.

Accordingly we are left with the wording of the statute and its logical application. Admittedly there are two requirements of the law which must be met. These are: (1) the land sought must bear improvements, and (2) there must be need for the land for the business purpose for which the site is requested.

It is my view that the majority completely ignores the realities of the situation and, more specifically, the purpose of the trade and manufacturing site law. I believe that both requirements of the law as to (1) improvements, and (2) need, have been met.

As to the issue of improvements -- it is well settled and it is admitted by the majority that an applicant does not have to have improvements on every acre of a trade and manufacturing site. It is a matter of judgment and of degree as to where you stop in

deciding which particular acre or acres must bear the improvements. The majority has stopped with the 2 1/2 acre site on which the spring is located. I stop beyond that so that the 22 1/2 acre watershed is included. My rationale is that the improvements of the spring, water lines, slaughterhouse building, and holding pens are sufficient improvements to satisfy the requirement for the entire 52 1/2 acres rather than the 30 acres found by the majority to be sufficiently improved. The majority admits to granting ten unimproved acres for future burial of offal. This is unimproved land in the same sense that the 22 1/2 acres of watershed is unimproved. The majority seems to grant the ten acres for the future burial of offal actually on a theory of greater need for burial of offal than the need for protecting a pure water supply. I think that both needs are equally persuasive and equally immediate. I conclude that the 22 1/2 acre watershed area is an integral and necessary part of the spring and that the spring is an integral and necessary part of the slaughterhouse operation. In all the circumstances, herein, I conclude that the improvements for the 30 acres granted by the majority constitute sufficient improvements on the 52 1/2 acres, including the watershed area, to satisfy the law.

As to the issue of need -- without pure water, the appellant is out of business. Springs are notoriously doubtful as a source of pure water. If applicant does not own the 22 1/2 acre watershed, he could be subjected to the septic tank of another homesteader, or to the contamination of a herd of livestock and his source of pure water, the spring, would be lost. Applicant shows no immediate danger of contamination because he has arranged his buildings and drainage so that there is no present danger of contamination. Is he to be penalized for good management?

As to the point that there is no protection from contamination from land beyond the 22 1/2 acre watershed, I can only say that to reasonable people, the nearby and adjoining land, if contaminated, is certainly the most likely source of contamination to the spring. Control of this land which lies next to the spring affords reasonable protection for the water supply for the slaughterhouse, and for the spring, which is an integral part of the business for which the site is sought. We are not here faced with the question of whether far-away land would be granted for a watershed, but only the question of nearby, adjoining land is before us.

Other avenues of protection, such as filing a declaration of appropriation of water under the statutes of the State of Alaska,

and recourse to the courts, are suggested by the decision below and are not rejected by the majority. The answer to that is that the best and only practical protection is to own the 22 1/2 acre watershed and this is the only sound basis for the applicant to continue his business and to invest his capital. He has already invested considerable capital in his business. It is totally unrealistic to think that he can continue a business which is absolutely dependent on pure water when the maintenance or the quality of the water depends on such future uncertainties as whether the government would grant him water rights or whether he might win a private law suit for contamination. In view of the foregoing, I would find that the use of the spring is indispensable to the operation of the business for which the trade and manufacturing site is sought, and that the 22 1/2 acre watershed is indispensable to provide pure water in the spring. Therefore the requirement of need is met.

As stated above, I believe that the requirements of the Act as to improvements and need are met. I further would find that granting the 52 1/2 acres herein satisfies both the purpose and the spirit of the law providing for trade and manufacturing sites. Accordingly, I would agree with the Administrative Law Judge and I would grant the appellant the 52 1/2 acres for a trade and manufacturing site, such site to include the watershed, which is defined as NW 1/4 NW 1/4 NW 1/4, W 1/2 NE 1/4 NW 1/4 NW 1/4, N 1/2 SW 1/4 NW 1/4 NW 1/4 NW 1/4 SE 1/4 NW 1/4 NW 1/4, sec. 8. 1/

Anne Poindexter Lewis, Member

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1/ I find the mill site cases cited in the decision by the Office of Appeals and Hearings, Bureau of Land Management, which is approved by the majority opinion herein, totally inapposite insofar as a trade and manufacturing site in Alaska is concerned. Further, I would distinguish the recent Golden Valley Electric Association, 8 IBLA 386 (1972), from the present case. In Golden Valley, where a portion of a requested trade and manufacturing site was denied, the use for the denied portion was a plan in the future to lay a pipeline across the additional land. In the instant case, the use of the watershed acreage is a present, integral, and essential part of, and is necessary to, the efficient operation of, the business for which the trade and manufacturing site is herein sought. The other cases relied on by the majority are so different on the facts that they are of little or no aid as precedents.

MR. FISHMAN DISSENTING.

I join in Member Lewis' dissent, but wish to make some further observations. The majority opinion states that the law "does not make large peripheral areas available to insulate or isolate a private business geographically, or to insure the claimant against possible incompatible uses which might cause difficulties or additional expense in the future". There are two basic elements involved (1) the absolute requirement of the additional acreage for the trade on manufacturing site, and (2) a sufficient buffer area which is reasonable in the light of the requirements of the business. The majority's view, taken literally, would compel the rejection of a trade and manufacturing site operated as a motel, where the cabins were set back 1/4 mile from a main road, to the extent of the acreage between the road and the actual situs of the cabins. This, of course, would disregard the desire of the public for freedom from the noise pollution engendered by vehicular traffic. Although a motel may be able to survive as an economic venture, even, when exposed to nearby noise, its value is considerably enhanced when it does not suffer from such a disability.

In the case at bar, it is clear that an unpolluted water supply is a sine qua non for the operation of the slaughterhouse. Concededly, a zoning ordinance, having legal efficacy, could protect appellant's water supply. However, the land is public land and not subject to such a zoning ordinance, nor is there any means by which appellant can create a dominant servitude on the 22 1/2 acres to protect his water supply.

The majority opinion, in my judgment, does not take due cognizance of the statutory language that "the area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry \* \* \* (emphasis supplied).

The need of appellant for protection of his water supply seems obvious and the able Judge recognized the need. Nor does the majority establish that the need is absent.

The cases cited by the majority in support of its conclusion are inapposite -none of them concerns a case, where the claimant's business need for the land sought was demonstrated.

I would grant appellant the area needed to protect his water source. I note that it involves very steep land, having a steady

drop of one foot to every ten feet, hardly the best land for other beneficiation.

Frederick Fishman

12 IBLA 327

